No. 03-9877

In The
Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

v.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND SEVEN OTHER STATES, AND ONE TERRITORY AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Are the provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc through § 2000cc-5, that require the States, as a condition of receiving federal funds, to implement a particular religious accommodation in state prisons, constitutional?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Alaska, Idaho, Iowa, Nebraska, North Dakota, Oklahoma, and West Virginia as well as the Territory of the Virgin Islands ("States") operate state correctional systems which are subject to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc through 2000cc-5. Like the Respondents, the States believe that RLUIPA is unconstitutional in the context of state prisons.[1] Unlike the Respondents, the States also believe that the United States Court of Appeals for the Sixth Circuit's Establishment Clause analysis is fundamentally flawed. Thus, the States urge this Court to invalidate RLUIPA in the state prison context, but to utilize different grounds than those employed by the Sixth Circuit and to repudiate explicitly the Sixth Circuit's Establishment Clause analysis. In taking these positions, the States seek to vindicate three distinct interests.

1. First, the States have an interest in making religious policy, subject only to the limitations imposed by the Constitution, without interference from the National Government. As originally envisioned by the Framers, the Establishment Clause had both a Libertarian Purpose and a Federalism Purpose. The Libertarian Purpose protected the People from the National Government. The Federalism Purpose ensured that the States would be able to exercise their sovereign authority to make religious policy subject only to the restriction imposed by their own State Constitutions. Although the adoption of the Fourteenth Amendment and resulting incorporation of the Religion Clauses severely limited the sovereign authority of the States to

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[1] RLUIPA has two parts. The first part, which is not at issue in this case, requires that religious organizations be given preferential treatment with respect to local planning and zoning laws. *See* 42 U.S.C. § 2000cc. The States take no position on the constitutionality of this portion of RLUIPA.

make religious policy, these developments did not wholly abolish the States' authority. Nor did they alter the Federalism Purpose of the Establishment Clause. As a result, the Establishment Clause continues to limit the power of the National Government. By enacting RLUIPA, which requires the States to accommodate religion in their state prisons in a manner not required by the Constitution, Congress has violated the Federalism Purpose of the Establishment Clause.

2. Second, the States have an interest in insuring that the National Government remains one of enumerated, hence limited, powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Indeed, "that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). In enacting RLUIPA, Congress has sought to use the Article I Spending Clause, U.S. Const. art. I, § 8, cl. 1, and Commerce Clause, U.S. Const. art. I, § 8, cl. 3, powers to circumvent this Court's holding in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). Because Congress cannot use the Fourteenth Amendment enforcement power, U.S. Const. amend XIV, § 5, to circumvent *Smith*, *see City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), it ought not be able to use the Article I powers to circumvent *Smith*. Moreover, even if Congress were not attempting to circumvent a constitutional decision of this Court, Congress' Article I Commerce and Spending Clause powers do not allow interference with the States' sovereign authority to define the terms and conditions of punishment for their criminals, subject only to the dictates of the Constitution.

3. Third, the States have an interest in being able to lift burdens imposed by the States on the free exercise of religion without also being required to lift similar burdens

on the exercise of other non-religious rights.[2] Indeed, this Court has recognized that the States may do so without violating the Establishment Clause. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.") (emphasis in original); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. It is well established, too, that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.") (citations omitted). Yet, the Sixth Circuit invalidated RLUIPA "because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation." *Cutter v. Wilkinson*, 349 F.3d 257, 262 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004). Accepting the Sixth Circuit's rationale would "work a profound change in [this] Court's Establishment Clause jurisprudence and in the ability of Congress [and the States] to facilitate the free exercise of religion in this country." *Madison v. Riter*, 355

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[2] In this respect, the interest of the States is remarkably similar to the interests articulated by New York and Washington. *See Brief of New York & Washington as Amici Curiae*. However, while the States agree with New York and Washington about the importance of government being able to lift burdens on the exercise of religious rights, the States disagree with New York and Washington on the issue of the constitutionality of RLUIPA. New York and Washington urge this Court to uphold RLUIPA. The States ask this Court to find that RLUIPA is unconstitutional as it applies to state prisons.

F.3d 310, 320 (4th Cir. 2003) (*Madison II*), *petition for cert. filed sub. nom. Bass v. Madison* (April 6, 2004) (No. 03-1404).[3] Thus, the States urge this Court to reject the Sixth Circuit's rationale.

SUMMARY OF ARGUMENT

The States contend that RLUIPA is unconstitutional as it applies to state prisons, but that the reasoning of the Sixth Circuit is fundamentally flawed. The argument in support of this contention is relatively straightforward.

1. RLUIPA violates the Federalism Purpose of the Establishment Clause. The Federalism Purpose of the Establishment Clause precludes the National Government from interfering with the States' sovereign authority to make religious policy subject only to the limitations imposed by the Constitution. Within the "play in the joints" between what the Establishment Clause prohibits and the Free Exercise requires, the States have broad discretion to make religious policy as they see fit. RLUIPA interferes with this discretion by imposing a particular prison religious accommodation policy. Thus, RLUIPA, as applied to state prisons, violates the Federalism Purpose of the Establishment Clause.

2. By enacting RLUIPA, Congress exceeded its constitutional authority. This is so for three reasons.

a. First, Congress may not use its Article I powers to circumvent a constitutional holding of this Court. RLUIPA represents Congress' latest attempt to circumvent this

[3] In *Madison II*, the Fourth Circuit explicitly rejected the reasoning utilized by the Sixth Circuit in *Cutter* and by the district court in *Madison v. Riter*, 240 F. Supp. 2d 566, 577 (W.D. Va. 2003) (*Madison I*). In concluding that RLUIPA was unconstitutional, the Sixth Circuit relied heavily on *Madison I*. *See Cutter*, 349 F.3d at 262.

Court's constitutional holding in *Smith*. If Congress cannot circumvent *Smith* using the Fourteenth Amendment enforcement power, *Boerne*, 521 U.S. at 532-36, then Congress cannot circumvent *Smith* using its ordinary Article I powers.

b. Second, by enacting RLUIPA, Congress has exceeded its authority under the Commerce Clause. Quite simply, Congress may not use the commerce power to regulate activities that have little or no impact on interstate commerce. Moreover, Congress may not regulate the States when the States act as sovereigns.

c. Third, by enacting RLUIPA, Congress has exceeded its authority under the Spending Clause. Congress may not use the Spending Clause to undermine the States' sovereign authority. Moreover, even if Congress generally may use the Spending Clause to undermine the States' sovereign authority, RLUIPA is unconstitutional because the requirement to adopt a prison religious accommodation policy is unrelated to any purpose for which federal funds are appropriated. Furthermore, even if the prison religious accommodation policy is related to the purpose for which federal funds are appropriated, RLUIPA is unconstitutionally coercive. Congress may not force the States to choose between forfeiting *all* federal funds and adopting a particular prison religious accommodation policy.

3. The Sixth Circuit's interpretation of the Establishment Clause must be rejected. The Sixth Circuit held that government may not lift the burdens on religious rights unless it also lifts the burdens on non-religious rights. This rationale is flawed for three reasons. First, it ignores this Court's precedents. Second, it ignores the Constitution's text. Third, it casts serious doubts on the validity of many laws and policies.

ARGUMENT

I. RLUIPA VIOLATES THE FEDERALISM PURPOSE OF THE ESTABLISHMENT CLAUSE.

A. The Federalism Purpose of the Establishment Clause Prohibits the National Government from Interfering with the States' Sovereign Authority to Make Religious Policy.

The Establishment Clause has two distinct purposes. First, it has a Libertarian Purpose, which limits the power of the National Government and the States with regard to the People. The Libertarian Purpose of the Establishment Clause mandates "a freedom from laws instituting, supporting, or otherwise establishing religion." Phillip Hamburger, *Separation of Church and State* 2 (2003). Second, and more significant for the present case, the Establishment Clause has a Federalism Purpose that limits the power of the National Government with regard to the States.[4] The Federalism Purpose of the Establishment

[4] Of course, this means that the Establishment Clause applies against the National Government in ways for which there is no comparable application against the States. However, such a difference in application is mandated by the historical purposes of the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. 'States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] – on a neutral basis – than the Federal Government.' Thus, while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other . . . ."); *Beauharnais v. Illinois*, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting) ("[T]he inappropriateness of a single standard for restricting State and Nation

(Continued on following page)

Clause mandates that the National Government may not interfere with the States' ability to make religious policy subject only to the limitations imposed by the Constitution. *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with [the States' religious policy choices]."). *See also* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 Mich. L. Rev. 2347, 2357 (1997) ("Congress has no power to dictate a position on religion . . . for states. It has no power to dictate church-state relations at all – where "state" refers to the governments of the several states. This is the core meaning of the Establishment Clause.").

Of course, the Federalism Purpose of the Establishment Clause assumes that the States have the sovereign authority to make religious policy and that the National Government may not interfere with the States' exercise of that authority. Both of these assumptions require some elaboration.

First, the States have the same sovereign authority to make religious policy. The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its

is indicated by the disparity between their functions and duties in relation to those freedoms."); *Roth v. United States*, 354 U.S. 476, 503-04 (1957) (Harlan, J., dissenting) ("The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal.").

own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).[5] By dividing sovereignty between the National Government and the States, the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 291 (James Madison) (Clinton Rossiter, ed., 1961, 1999 prtg.).[6] This division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint," *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002), and "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). Thus, although the States surrendered many of their sovereign powers to the new Federal Government, "the States retain substantial

[5] Justice Kennedy's idea of dividing power between dual sovereigns is not new. As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 Alfred H. Kelly, Winfred A. Harbison, & Herman Belz, *The American Constitution: Its Origins and Development* 46-49 (7th ed. 1991).

[6] *See also The Federalist No. 28*, at 149 (Alexander Hamilton) (Clinton Rossiter, ed., 1961, 1999 prtg.) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); *The Federalist No. 39*, at 213 (James Madison) (Clinton Rossiter, ed., 1961, 1999 prtg.) ("[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.") (emphasis original); *The Federalist No. 81* at 455 (Alexander Hamilton) (Clinton Rossiter, ed., 1961, 1999 prtg.) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*") (emphasis original).

sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).[7]

Among the sovereign powers retained by the States is the authority to make religious policy. Originally, this authority was quite broad. Prior to the adoption of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, the Establishment Clause, like other provisions of the Bill of Rights, limited only the National Government. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the States were free to do whatever they wished with respect to religion, subject only to the commands of their own State Constitutions. *See Locke v. Davey*, 540 U.S. 712, 723 (2004) (describing the history of state constitutional restrictions on the establishment of religion). Now that the Fourteenth Amendment has made both the Establishment and Free Exercise Clauses applicable to the States, *see Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause), the States are restricted substantially in their authority to make religious policy. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972) (Free

[7] The principle that the Constitution divides power between *dual sovereigns*, the States and the Federal Government, is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. *See Printz v. United States*, 521 U.S. 898, 919 (1997). Indeed, this division of sovereignty between the States and the Federal Government is preserved and reinforced by the Constitution's structure. *See Alden v. Maine*, 527 U.S. 706, 714-15 (1999). These structural limitations, which are above and beyond the limitations imposed by the text of the Bill of Rights or other constitutional provisions, restrict the power of the Federal Government so as to preserve the sovereignty of the States, and vice versa. *See generally* J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523 (2001).

Exercise Clause allows parents to refuse to send children to school beyond the age of thirteen); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (Establishment Clause prohibits practice of daily reading from the Bible in the public schools, even where students are allowed to absent themselves upon parental request). However, because there is "play in the joints" between what the Establishment Clause prohibits and the Free Exercise Clause requires, *Locke,* 540 U.S. at 718-19, the States retain substantial sovereign authority to make religious policy.[8]

Second, when the States exercise their sovereign authority to make religious policy, the National Government may not interfere.[9] *See Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting) (noting that the Establishment Clause was adopted, in part, "to protect state establishments of religion from federal interference"). *See also* Joseph Story, *Commentaries on the Constitution of the United States*, § 1873 (1833) (The Establishment Clause was intended "to exclude from the national government *all power* to act upon the subject [of religion].") (emphasis added); *Id.* ("[T]he whole power over the subject of religion

[8] Several examples demonstrate the point. A state university professor may excuse a Jewish student from class for Yom Kippur while refusing to excuse the student who wishes to attend a political protest. A police department may allow a female officer, who is Jehovah's Witness, to wear a skirt while forcing other female officers to wear pants. A public school cafeteria may offer Muslim students an alternative to pork while refusing to offer alternative meals to those students who simply dislike pork. In each instance, the government is not constitutionally required to accommodate the religious exercise, *see Smith*, 494 U.S. at 879, but is not constitutionally prohibited from doing so.

[9] Although the Federalism Purpose of the Establishment Clause confirms this proposition, it would be equally true even if the Establishment Clause did not exist. Quite simply, the National Government may not interfere with the States' exercise of their sovereign authority.

is left *exclusively* to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.") (emphasis added). Moreover, this limitation on the powers of the National Government was recognized widely at the time of the Framing. *See* James Madison, *General Defense of the Constitution* (June 12, 1788), reprinted in 11 *Papers of James Madison* 129, 130 (Robert A. Ruland, et al., eds., 1977) ("There is not a shadow of right in the general government to intermeddle with religion. Its least interference with [religious policy of the States] would be a most flagrant usurpation."); James Iredell, *Debate in North Carolina Ratifying Convention* (June 30, 1788) in 5 *The Founders' Constitution* 90 (Phillip B. Kurland & Ralph Lerner, eds., 1987) (The National Government "certainly [has] no authority to interfere in the establishment of religion whatsoever. . . . "). Indeed, as one of America's leading constitutional historians observed:

> [A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.

Leonard W. Levy, *The Establishment Clause* 74 (1986). Similarly, Professor Schrager has explained:

> [T]he Religion Clause emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.

Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810, 1823 (2004). *See also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 32-42 (1998).

The principle that the National Government may not interfere with the States' sovereign authority to make religious policy is demonstrated easily. Most obviously, prior to the adoption of the Fourteenth Amendment, the States had the sovereign authority, subject only to their respective State Constitutions, to establish or disestablish a church. Had Congress, in the exercise of its Article I powers, attempted to force the States to establish or disestablish a church, Congress would have acted unconstitutionally. In other words, Congress could not have passed a statute requiring the States to choose between receiving federal funds and establishing or disestablishing a church. Similarly, after the adoption of the Fourteenth Amendment, the States have the sovereign authority to choose to fund indirectly religious activity. Although the Establishment Clause does not prohibit the indirect funding of religion, *see Zelman*, 536 U.S. at 652 (2002) (holding that school choice vouchers may be used at private religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (holding that a disabled student at private religious school could receive special education services); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (holding that State could provide funds for the education of blind student studying for the ministry), the Free Exercise Clause does not require that the States indirectly fund religious education or activity. *See Locke*, 540 U.S. at 720-25. If Congress, in the exercise of its Article I powers, attempts to force the States to fund or not to fund indirectly religious activity, then Congress acts unconstitutionally. In other words, Congress could not pass a statute requiring the States to choose between receiving federal funds and

allowing religious schools to participate in a school choice program.[10]

B. By Enacting RLUIPA, Congress Has Interfered with the States' Sovereign Authority to Make Religious Policy.

RLUIPA interferes with the States' sovereign authority to enact religious policy within the zone between what the Establishment Clause prohibits and what the Free Exercise Clause requires. Specifically, RLUIPA mandates that whenever the States' policies of general applicability impose a "substantial burden" on religion, the State must accommodate the religious exercise unless it can demonstrate that its interests are compelling and that its interests cannot be achieved through less intrusive means. 42 U.S.C. § 2000cc-1(a). To illustrate, suppose that a prison has a policy that inmates may not wear hats or other head coverings because prisoners might use them to hide weapons or other contraband. Although the policy is one of general applicability, a Sikh prisoner says that the policy violates his Free Exercise rights because his religious

[10] In some extraordinary circumstances, Congress may be able to dictate how the States exercise their discretion with respect to religion. Section 5 of the Fourteenth Amendment empowers Congress to enforce the Establishment Clause and the Free Exercise Clause when it can be demonstrated that the States have engaged in unconstitutional conduct and when the resulting legislation is proportionate to the constitutional violations. *Boerne*, 521 U.S. at 532-36. In determining whether legislation is proportionate in contexts other than the Religion Clauses, the Supreme Court has upheld prophylactic measures that require or prohibit more than mere adherence to parameters imposed directly by the Constitution. *See, e.g., Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004). Assuming that Section 5 allows Congress to act in a similar fashion in the area of religion, and assuming that the other prerequisites of Section 5 are met, then a Congressional mandate for States to exercise their discretion in a particular manner would not violate the Establishment Clause.

beliefs require him to wear a hat or a turban. Under *Smith* and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987),[11] because the policy is one of general applicability, the federal Free Exercise Clause does not compel the State to provide accommodation.[12] *See Hines v. South Carolina Dep't of Corr.*, 148 F.3d 353, 357-58 (4th Cir. 1998). Yet, RLUIPA supplants the constitutional standard of *Smith* and *O'Lone* and requires that the State accommodate the request.

Although this requirement may seem relatively benign, RLUIPA has the effect of undermining the States' efforts to combat prison gangs. Indeed, white supremacists and other gangs have routinely invoked RLUIPA to thwart the States' anti-gang practices. *See, e.g., Johnson v. Martin*, 223 F. Supp. 2d 820, 822-23 (W.D. Mich. 2002); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 833, 834 (S.D. Ohio 2002); *Marria v. Broaddus*, 200 F. Supp. 2d 280, 284 (S.D.N.Y. 2001). Moreover, RLUIPA's "least restrictive means" test provides uncertain standards, greatly complicating prison management. Before *O'Lone*, courts scrutinized prison regulations under tests varying from rational basis to strict scrutiny and, not surprisingly, reached conflicting results as to the propriety of indistinguishable actions. This Court ultimately rejected the "least restrictive means" test because, "every administrative judgment [was] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner v. Safley*, 482 U.S. 78, 89

[11] Under *O'Lone*, "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349.

[12] There is some question as to whether the constitutional Free Exercise claims of prisoners are governed by the *Smith* standard or by the *O'Lone* standard. *See Hines*, 148 F.3d at 357. This Court need not resolve that issue in this case. RLUPIA requires far more than either *Smith* or *O'Lone*.

(1987). That uncertainty greatly interfered with the States' ability to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.*[13]

By enacting RLUIPA, Congress has exceeded its authority because those provisions interfere with the States' discretion to fill "the play in the joints" as they deem appropriate. While RLUIPA *favors* the accommodation of religion, it interferes with States' sovereignty just as much as if Congress had *prohibited* such accommodation. If the Congress that enacted RLUIPA may constitutionally exercise the power asserted, it is difficult to see how the Constitution would protect the States against some future Congress' action based upon using federal power for the opposite result. *See* Rubenfeld, *supra* at 2357 ("Congress may not try to dictate church-state relations even to vindicate religious toleration or free exercise. . . . To the extent that state can constitutionally enact laws [concerning religious policy], Congress can make no law instructing them not to do so. That would be a quintessential violation of the [Establishment Clause]. . . . ").

II. BY ENACTING RLUIPA, CONGRESS HAS EXCEEDED ITS CONSTITUTIONAL AUTHORITY

A. Congress May Not Use Its Article I Powers to Circumvent a Constitutional Holding of This Court.

Congress enacted RLUIPA as a means of circumventing this Court's decision in *Smith*. *See Madison*, 355 F.3d

[13] Of course, before this Court invalidated the Religious Freedom Restoration Act, *see Boerne*, 521 U.S. at 532-36, inmates routinely manipulated the "strict scrutiny" standard. *See, e.g., Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996); *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996).

at 314-15.[14] In *Smith*, this Court effectively overruled *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), and held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879. *See also United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring). In other words, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1 through 2000bb-4, which effectively sought to overrule the holding in *Smith* and restore the *Sherbert* standard. Congress sought to justify this attempt to circumvent a constitutional holding of this Court by relying on its powers to enforce the Fourteenth Amendment. However, in *Boerne*, this Court rejected that argument and invalidated RFRA as it applies to the States and local governments. *See Boerne*, 521 U.S. at 532-36. In doing so, this Court emphasized that the meaning of the Constitution is determined by this Court, not by Congress or the Executive Branch or the States. *See Id.* at 524.

In response to *Boerne*, Congress passed RLUIPA, which effectively sought to overrule *Smith* and restore the *Sherbert* standard in the limited contexts of local land use decisions and institutionalized persons. "Congress sought to avoid *Boerne's* constitutional barrier by relying on its

[14] Moreover, to the extent that the free exercise claims of prisoners are governed by *O'Lone* rather than *Smith*, RLUIPA represents an attempt to circumvent this Court's constitutional holding in *O'Lone*.

Spending and Commerce Clause powers, rather than on its remedial powers under section 5 of the Fourteenth Amendment as it had in RFRA." *Madison*, 355 F.3d at 315. In other words, Congress believed that it could use its Article I powers to circumvent a constitutional holding of this Court.

Congress' belief is mistaken. If a constitutional holding cannot be circumvented by the use of the extraordinary Fourteenth Amendment enforcement power, *Boerne*, 521 U.S. at 532-36, then it certainly cannot be circumvented by the general Article I powers. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683-84 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)]."). This Court should invalidate RLUIPA for the simple reason that it is an attempt by Congress to use its Article I powers to circumvent a constitutional holding of this Court.

B. By Enacting RLUIPA, Congress Has Exceeded Its Authority Under the Commerce Clause.

In enacting RLUIPA, Congress relied upon the Commerce Clause. Indeed, the statute explicitly states that RLUIPA is applicable whenever the burden on religion or its removal affects "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2).

However, RLUIPA is not a valid exercise of the Article I Commerce Clause Power. This is so for two reasons. First, a State's operation of its prisons has little or no impact on interstate commerce. Second, even if a State's operation of its prisons has a substantial impact on interstate commerce,

Congress may not regulate the States when the States act as sovereigns.

1. Congress May Not Use the Commerce Power to Regulate Activities That Have Little or No Impact on Interstate Commerce.

This Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). First, Congress may "regulate the use of the channels of interstate commerce." *Id.* at 558. Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* Third, Congress may regulate "intrastate activities having a substantial relation to interstate commerce." *Id.* at 558-59. This Court has stated that this last category includes only those activities that are economic in nature. *Id.* Thus, if RLUIPA is a valid exercise of the Commerce Clause, RLUIPA must fit into one of these three categories.

RLUIPA does not fit into either of the first two categories. A state prison's policies regarding religious accommodation within the prison do not involve the use of a channel of interstate commerce. Nor do a state prison's policies concerning religious accommodation involve an instrumentality of interstate commerce. Goods and services do not legally flow between the States using the prisons. Rather, a state prison's policies concerning religious accommodation are simply an *intrastate* activity. Thus, for RLUIPA to be a valid exercise of the Commerce Clause power, RLUIPA must fit into the third category – the regulation of intrastate activities that substantially affect interstate commerce.

The test for determining whether an intrastate activity substantially affects interstate commerce varies depending on whether the regulated activity is economic in nature. If the intrastate activity is economic in nature, the impact of all similar activity nationwide is considered. Conversely, if the intrastate activity is not economic in nature, its impact on interstate commerce must be evaluated on an individualized, case-by-case basis. *See United States v. Morrison*, 529 U.S. 598, 617-19 (2000). Thus, the question becomes whether a state prison's religious accommodation policies are economic in nature.

A state prison's religious accommodation policies are clearly non-economic in nature. Such policies are a reflection of security and safety concerns. Commercial considerations are not involved. Rather, the focus is on preventing disruption and maintaining a stable prison environment. It "has nothing to do with 'commerce' or any sort of economic enterprise." *Lopez*, 514 U.S. at 561. It is not "an essential," or indeed any, "part of a larger regulation of economic activity." *Id.* A state prison's religious accommodation policy is not "in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613 (citation omitted).

2. Congress May Not Regulate the States When States Act as Sovereigns.

Moreover, even if the regulation of the States' prison religious accommodation policies did substantially affect interstate commerce, RLUIPA still would not be a valid exercise of the Commerce Clause. Congress may not regulate the States when the States act as sovereigns.

To explain, while Congress may regulate the States when the States engage in general commercial activities, *Reno v. Condon*, 528 U.S. 141, 150-51 (2000), Congress may not regulate the States when the States act in their sovereign capacities. *See Printz*, 521 U.S. at 924 ("Even

where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."); *New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

To illustrate, Congress may require those States that sell oranges to comply with the same U.S. Department of Agriculture regulations applicable to private orange sellers. However, Congress may not require the State to enact certain policies toward sellers of oranges. The former is a regulation of interstate commerce; the latter is a regulation of the States as sovereigns. In enacting RLUIPA, Congress clearly is regulating the States in their sovereign capacity. This is not a statute generally regulating commerce that is applicable to private parties and States alike if the States choose to engage in a particular economic activity. Rather, this is a statute that regulates religious accommodation in prisons and, by its very terms, is applicable only to the States and the States' agents. Accordingly, RLUIPA is not a valid exercise of the Commerce Clause power.

C. By Enacting RLUIPA, Congress Has Exceeded Its Authority Under the Spending Clause.

In enacting RLUIPA, Congress also relied on the Spending Clause. Indeed, the statute explicitly states that

it is applicable to any "program or activity that receives Federal financial assistance," 42 U.S.C. § 2000cc-1(b)(1).

However, RLUIPA is not a valid exercise of the Article I Spending Clause Power. This is true for three independent reasons. First, Congress may not use the Spending Clause to undermine the States' sovereign authority. Second, even if Congress generally may use the Spending Clause to undermine the States' sovereign authority, RLUIPA is unconstitutional because the requirement to adopt a prison religious accommodation policy is unrelated to any purpose for which federal funds are appropriated. Third, even if the prison religious accommodation policy is related to the purpose for which federal funds are appropriated, RLUIPA is unconstitutionally coercive. Congress cannot force the States to choose between forfeiting *all* federal funds and adopting a particular prison religious accommodation policy.

1. The Spending Clause May Not Be Used To Undermine The States' Sovereignty.

One component of the States' sovereignty is the authority to define the terms and conditions of punishment for its criminals, subject only to the dictates of the Constitution. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with the state laws, regulations, and procedures, than the administration of its prisons."). Undoubtedly, the States will vary in how they exercise their sovereign authority. Some States may operate their prisons as rehabilitative centers for self-improvement while other States may view their prisons as a means of inflicting the harshest punishment permitted by the Constitution. Congress, foreign nationals, citizens of other States, and even a State's own citizens may disagree with the policy choices of various States. However, as long as

the State complies with the restrictions of the Constitution, the State has the sovereign authority to pursue the policies and practices it deems necessary and appropriate with respect to the operation of its prisons.

RLUIPA eliminates the States' sovereign authority over their prisons by requiring that, as a condition of receiving any federal funds for corrections, a State must adopt a particular prison religious accommodation policy. Essentially, the States must choose between maintaining their sovereign authority to operate their prisons as they wish, subject only to the Constitution, and receiving federal funds for correctional purposes.

Forcing the States to make such a choice is unconstitutional. The National government cannot purchase the States' sovereignty. If government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). Quite simply, if Congress can use the Spending Clause power to eliminate the States' sovereign authority over prisons, then it can use the Spending Clause power to replace the States' sovereign authority over education, criminal law, domestic relations, transportation, taxation, and a myriad of other subjects.

In order to protect the States' sovereignty, the "mechanism for exercising power under the Spending Clause, however, must have limits."[15] *Litman v. George*

[15] In its efforts to preserve the States' sovereignty, this Court has limited Congress' Commerce Clause power, *Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 563-64, as well as its power to enforce the Fourteenth Amendment, *Morrison*, 529 U.S. at 619-27; *Boerne*, 521 U.S. at 519-24. However, this Court has not articulated similar limits on the Spending Clause power. Consequently, Congress now has "a seemingly easy end run around any restrictions the Constitution might be found

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Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999). "If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., joined by Brennan, J., dissenting). Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *Lopez*, 514 U.S. at 578 (Kennedy, J., joined by O'Connor, J., concurring), the Spending Clause cannot be used to "render academic the Constitution's . . . limits of federal authority." *New York*, 505 U.S. at 167.

2. The Conditions Imposed by RLUIPA Are Unrelated to Any Purpose for Which Federal Funds Are Provided to State Correctional Systems.

Even if Congress generally may use its Spending Clause power to undermine the States' sovereign authority, RLUIPA is still unconstitutional. The requirement that the States adopt a particular prison religious accommodation policy is unrelated to any purpose for which federal funds are offered to the States.

to impose on its ability to regulate the states. Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states." Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 Harv. J.L. & Pub. Pol'y 95, 101 (1998). Indeed, "the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate." Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 Annals 104, 105 (2001).

In *Dole,* this Court declared, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207. *See also Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). The reason for this requirement is clear – conditions on the receipt of federal funds always must "bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167 (citations omitted).

RLUIPA fails the relatedness test. Quite simply, there is no apparent federal interest at stake in the operations of state prisons. First, unlike many federal programs, Congress is not directing how a specific appropriation is spent. In other words, RLUIPA is unlike Congress appropriating money for prison construction and then dictating the size of each individual cell. Rather, in enacting RLUIPA, Congress is simply adding these conditions as an afterthought to other appropriations for other purposes. Second, unlike the highways at issue in *Dole*, state prisons are not instrumentalities of commerce. It is one thing for Congress to attach conditions to the receipt of federal funds in order to make an instrumentality of commerce safer. It is quite another for Congress to attach conditions to the receipt of federal funds as a means of substituting its judgment for that of state officials. Third, unlike Title VI, 42 U.S.C. § 2000d, Congress is not requiring the States to merely comply with the Constitution. *See Grutter v. Bollinger,* 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (noting that Title VI is coextensive with the Equal Protection Clause). Rather, RLUIPA requires accommodation of religious belief that is simply not required by either *Smith* or *O'Lone.*

3. RLUIPA Is Unconstitutionally Coercive.

Even if Congress generally may use the Spending Clause to undermine the States' sovereignty and even if RLUIPA is related to the purpose for which federal funds are provided, RLUIPA is still unconstitutional. The choice imposed by RLUIPA is unconstitutionally coercive.

Although this Court has recognized that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take," *College Sav. Bank*, 527 U.S. at 686, this Court has also recognized that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211. *See also Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). "If the Congressional action amounts to coercion rather than encouragement, then that action is not a proper exercise of the spending powers but is instead a violation of the Tenth Amendment." *West Virginia v. Dep't of Health & Human Servs.*, 289 F.3d 281, 286-87 (4th Cir. 2002). *See also College Sav. Bank*, 527 U.S. at 687 ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity."). Thus, "federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect." *West Virginia*, 289 F.3d at 291.[16]

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[16] Of course, several Circuits have suggested that the coercion principle is substantively meaningless. *See Kansas v. United States,* 214 F.3d 1196, 1202 (10th Cir. 2000) ("[T]he coercion theory is unclear, suspect, and has little precedent to support its application."); *California*

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RLUIPA requires the States to either adopt a particular prison religious accommodation policy or lose *all* federal funds for *all* correctional operations. To explain, RLUIPA applies to any "program or activity" that receives federal funds. 42 U.S.C. § 2000cc-1(b)(1). The term "program or activity" is defined as "all of the operations of any entity" described in 42 U.S.C. § 2000d-4(a)(1) or (2). 42 U.S.C. § 2000cc-5(6). That provision covers a variety of entities including "a department, agency, special purpose district, or other instrumentality of a State or a local government." 42 U.S.C. § 2000d-4(a)(1). In other words, if "any part" of a State's correctional system receives "federal financial assistance" for any purpose, then all operations of the correctional system are covered. *See* 42 U.S.C. § 2000cc-1; 42 U.S.C. § 2000d-4. That federal funds do not affect the Department of Corrections' religious accommodation programs is of no consequence.

In *Dole*, this Court's coercion analysis focused not on the amount of money at issue or the percentage of the State's budget at issue, but on the *percentage of federal money at issue*. This Court held that a statute that required forfeiture of five percent of federal funds was not coercive. *Dole*, 483 U.S. at 211. In doing so, this Court necessarily implied that some number greater than five percent of federal funds would be coercive. While one can

v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) ("[T]o the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record."); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice. . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.").

only speculate as to what that number is, surely a statute that requires the loss of one hundred percent of federal funds meets that test. *See Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (Luttig, J., joined by Wilkinson, C.J., Russell, Widener, Wilkins, & Williams, JJ., announcing the judgment of the court) (There is unconstitutional coercion when the National Government "withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact."). Indeed, if one hundred percent withdrawal does not exact coercion, then the coercion principle is essentially empty.[17]

III. THE SIXTH CIRCUIT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE SHOULD BE REJECTED.

In striking down RLUIPA, the Sixth Circuit set out a unique interpretation of the Establishment Clause. Under this theory, "[w]hen Congress acts to lift the limitations on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief. When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause." *Cutter*, 349 F.3d at 266 (quoting *Madison I*, 240 F. Supp. 2d at 577). In other words, the accommodation of religious rights cannot be treated any better (or any worse) than

[17] Moreover, unlike the program at issue in *Dole*, which was limited to funds for a *single* purpose, RLUIPA threatens the loss of *all* funds for *all* purposes.

the accommodation of non-religious rights. Thus, Congress may not "reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." *Madison II*, 355 F.3d at 319. In the Sixth Circuit's view, additional protection for religious rights is permitted only if there is "evidence that religious rights are at greater risk of deprivation . . . than other fundamental rights." *Cutter*, 349 F.3d at 265.

Although the Sixth Circuit reached the correct result in that it declared RLUIPA unconstitutional, its rationale must be rejected. This is so for three reasons.

First, the Sixth Circuit's rationale contradicts this Court's decisions upholding "a broad range of statutory religious accommodations against Establishment Clause challenges." *Brown v. Gilmore,* 258 F.3d 265, 275 (4th Cir.), *cert. denied*, 534 U.S. 996 (2001). Indeed, this Court has upheld statutes permitting schools to release students for religious worship, *Zorach v. Clauson,* 343 U.S. 306, 315 (1952), property tax exemptions for church property, *Walz v. Tax Comm'n,* 397 U.S. 664, 680 (1970), and exemptions for religious organizations from anti-discrimination laws, *Amos*, 483 U.S. at 335. Thus, "[t]here is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights." *Madison II*, 355 F.3d at 318.

Second, the Sixth Circuit's analysis ignores the Constitution's text, which confers special protections for religious rights. The fact that religious rights are explicitly mentioned and that there is no textual command for symmetry with non-religious rights suggests that religious rights may be given favorable treatment if the government desires. As the Fourth Circuit observed:

> Free exercise and other First Amendment rights may be equally burdened by prison regulations, but the Constitution itself provides religious exercise with special safeguards. And no provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection. To attempt to read a requirement of symmetry of protection for fundamental liberties would not only conflict with all binding precedent, but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn.

Madison II, 355 F.3d at 319.

Third, and most importantly, the Sixth Circuit's reasoning would have profound and widespread effects. Indeed, acceptance of the Sixth Circuit's rationale:

> would throw into question a wide variety of religious accommodation laws. It could upset exemptions from compulsory military service for ordained ministers and divinity students under federal law, since these exemptions are not paired with parallel secular allowances or provisions to protect other fundamental rights threatened by compulsory military service. It would similarly imperil Virginia's and other states' recognition of a "clergy-penitent privilege," which exempts from discovery an individual's statements to clergy when "seeking spiritual counsel and advice." Other specific religious accommodation statutes, ranging from tax exemptions to exemptions from compulsory public school attendance, would also be threatened.

Madison II, 355 F.3d at 320 (citations omitted). Furthermore, the Sixth Circuit's rationale "would create a test that Congress could rarely, if ever, meet in attempting to lift regulatory burdens on religious entities or individuals." *Id.*

CONCLUSION

RLUIPA, as applied to state prisons, is unconstitutional. The judgment of the United States Court of Appeals for the Sixth Circuit should be AFFIRMED, but for reasons other than those articulated by the lower court.

Respectfully submitted,

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February 11, 2005

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